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No. 729

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

JOSEPH B. DECKER, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Your petitioner, Joseph B. Decker, prays that writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above cause on January 21, 1944, affirming the judgment of the United States District Court for the District of Maryland.

Opinions Below.

The opinion of the district court overruling demurrer (R. 12) is not officially reported. The opinion of the same court on motion in arrest of judgment and for new trial (R. 55) is reported in 51 F. Supp. 15. The opinion of the

circuit court of appeals (R. 122) is not yet officially reported.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered on January 21, 1944 (R. 125). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

Questions Presented.

1. Whether on indictment for use of the mails to defraud, where the scheme to defraud alleged, and shown by the evidence, is that of a managing vice president to defraud a corporation by drawing corporation checks on a Pittsburgh bank, payable to his secretary, charging such checks on the books to "commissions" and causing her to cash them at an Elkton, Maryland, bank and deliver the money to him—Whether the evidence is sufficient as a matter of law to show use of the mails "for the purpose of executing such scheme" within the meaning of the statute when the only use of the mails in evidence is the subsequent mailing by the Elkton bank of each check to Pittsburgh for payment after the Elkton bank had become the holder in due course, after the loss to the corporation thereon was beyond prevention and after the fraud so far as each such check was concerned had been fully consummated by the payment of cash to the defendant.

2. Whether—after the defendant has obtained the cash proceeds of such check and after the victim's liability thereon has become unavoidable and the fraud as to that check has thus been consummated—the subsequent mailing of the check for collection by an innocent holder in due course may nevertheless be held as a matter of law to be a

mailing "for the purpose of executing such scheme" merely because the scheme is shown to have contemplated the cashing of a series of such checks.

Statute Involved.

The Act of March 4, 1909, c. 321, Sec. 215, 35 Stat. 1130 (18 U. S. C. Sec. 338) provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall *for the purpose of executing such scheme* or artifice or attempting so to do, place, or cause to be placed, any letter, * * * [or] writing, * * * in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * shall be fined not more than $1,000 or imprisoned not more than five years, or both." (Emphasis supplied.)

Statement.

Indictment.—Appellant, with Gustav H. Kann, was named defendant in an indictment in five counts, each of which alleged use of the mails in violation of the mail fraud statute (18 U. S. C., Sec. 338) in furtherance of an alleged scheme to defraud Triumph Explosives, Incorporated, its stockholders and the Peoples-Pittsburgh Trust Company. Briefly, the indictment alleged that Kann, as President, and Decker, as Vice President and General Manager, devised a scheme to misappropriate the funds of the company by causing Decker's secretary to withdraw its funds from the Peoples-Pittsburgh Trust Company of Pittsburgh, Pennsylvania, and from the People's Bank of Elkton, Maryland, on checks of the company made payable to her. It was further alleged to be part of the scheme

to cause her to cash the checks and to deliver the cash to them, to conceal this misappropriation of funds by causing the expenditures to be charged to "Commissions" on the books of the corporation, and to thus increase their compensation as officers of the company without first obtaining approval of the Trust Company contrary to a loan agreement with the Trust Company (R. 1-4).[1]

Each of the five counts charged that the defendants for the purpose of executing said scheme caused to be placed in the mails at Elkton on the stated date a check drawn by the Triumph Explosives, Inc. on the Peoples-Pittsburgh and Trust Company (R. 4-11).

Verdict and sentence.—There was a verdict of guilty on all counts against both defendants. The defendant Kann was given a sentence of imprisonment of three years and a fine of $5,000, but execution of the sentence of confinement was suspended on condition of payment of fine, costs, and the additional sum of about $32,000 as restitution to Triumph Explosives, Inc. (Tr. 587).[2] Appellant was sentenced to imprisonment for three years and to pay a fine of $1,000 (R. 64).

The evidence.—In pertinent substance, the evidence showed:

Triumph Explosives, Inc., has long manufactured fireworks, and since 1939 ordnance. In 1941 and 1942 its ordnance contracts included those with The Netherlands and Chile (Tr. 55-56, 368). Gustav H. Kann was President and appellant Decker, since 1933, has been Executive Vice President of Triumph Explosives, Inc., at salaries of $1,050 and $18,000 per year, respectively (Tr. 60, 378-379). Of the total outstanding shares of the Company, Decker owned

[1] Apparently because it was guaranteed against loss, the theory of fraud on the Trust Company was not emphasized at the trial and was not relied upon by the Government on appeal.

[2] References to "Tr." are to the pages of the original transcript of record in accordance with stipulation (R. 127).

two or three per cent and Kann, with his brother and their two families owned about twenty per cent (Tr. 264, 266-268).

Elizabeth Jackson was the Assistant Secretary of the Company and personal secretary to Decker (Tr. 54, 56).

The Government offered in evidence nine checks totaling $84,106, dated between February 8, 1941, and April 23, 1942, and with the exception of one, all co-signed by Decker with either Kann or Criswell, the second Vice President of the Corporation (Tr. 67, 138). The five checks relied on in the indictment were all drawn on the Peoples-Pittsburgh Trust Company [3] (R. 4-11):

April 18, 1941	$13,703.50
July 21, 1941	1,300.00
August 14, 1941	5,200.00
January 14, 1942	10,312.50
April 23, 1942	20,625.00

Manner of drawing and charging checks on corporation's books to effect and conceal the fraud.—In each instance Miss Jackson, at the instruction of the defendants made out the check to herself as payee, took it to the People's Bank of Elkton and there cashed it, obtaining cash, or cashier's check or draft, or both (R. 79-80; Tr. 72-73, 98, 127-130, 135). As stated by Judge Chesnut in his opinion (R. 57): "All these checks were made payable to Miss Jackson and endorsed by her and cash therefor or cashier's checks received from the Elkton State Bank where the corporation had an account. In all, nine such checks were drawn and the proceeds immediately handed over by Miss Jackson to the defendants."

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[3] Four checks were drawn on the People's Bank of Elkton and not referred to in the indictment (Tr. 70-71):

February 8, 1941	$14,942.50
April 7, 1941	5,760.00
September 25, 1941	1,950.00
January 10, 1942	10,312.50

The result was that when the check was written, in the corporation's books the entry in the check register in each instance was carried into the ledger as a debit against Miss Jackson's account in the Accounts Payable ledger (R. 85; Tr. 132, 150-151).

Miss Jackson made up supporting vouchers to be sent to Mr. Vernon, the Comptroller, for entry of the charges on the corporation's books (Gov't. Exhibit No. 2, R. 83, Tr. 81-83). Each bore the direction "To Commission" at the direction of Decker or Kann (Tr. 88). These were approved by Mr. Decker before transmittal to the Comptroller in the Accounting Department (Tr. 82). When each voucher was received in the Accounting Department, a credit was made to her account in the Accounts Payable ledger and a corresponding debit was made either to the Commissions Account or to Prepaid Miscellaneous Expense. Of the $84,106 total for the nine checks, $69,163.50 was charged to the former account and $14,942.50 to the latter (Tr. 84, 88, 139-140, 145-146). Later, when the contracts reached the necessary stage the charges to Prepaid Miscellaneous Expense were closed into Commissions (Tr. 147-149). Thus, the books as kept showed that Miss Jackson got the money (R. 85, 91; Tr. 149-151).

Concealment from Board of Directors.—At a meeting of the board of directors, attended by Kann and his brother, Decker, Colonel Shirley and Mr. MacBryde, on October 1, 1942, the foreign commission items were discussed and it was stated that the Navy Department auditor had objected to certain commissions paid on foreign business and they would have to be straightened out—the sum of some $80,000 being stated as the amount involved. Neither Kann nor Decker told the directors who had received the money (Tr. 240-243). They stated that the names of the persons to whom the money was paid were a matter of confidence, but

that it was for the benefit of the corporation's business and all in connection with foreign contracts (R. 94-97; Tr. 243-246). The minutes of the October 1 meeting with reference to the foreign commissions were read at a subsequent meeting on October 7, 1942, attended by the two Kanns, Isaac Diamondstone, Mr. MacBryde and Colonel Shirley together with Mr. Townsend, Colonel Shirley's attorney, Mr. Weil, an attorney from Pittsburgh, and Mr. Sabel, the auditor (R. 258-259; Tr. 251-353). Mr. Sabel also brought the matter up, stating that the payment of the money had been questioned by the Government in connection with renegotiation (Tr. 260). The defendants stated that the money had been spent for commissions on foreign sales, but refused to name the persons who received the money (Tr. 256).

Disposition of proceeds of checks.—All of the proceeds of all nine checks were turned over to Decker or Kann by Miss Jackson (Tr. 79). Kann admitted that he had gotten some of the money (Tr. 348, 350, 352, 354, 379, 380, 382).

There was testimony that Decker admitted that he and Kann had each received one-fourth of the foreign commission amounts and asserted that the other one-half had been paid to persons he refused to name (Tr. 353).

Evidence that forwarding of checks by Elkton bank for clearance was not for the purpose of executing scheme.—Argus F. Robinson, cashier of the People's Bank of Elkton testified that the five checks drawn on the Peoples-Pittsburgh Trust Company cleared through his bank (R. 65). The same witness testified that all of the checks involved were cashed before they were sent to Pittsburgh. In each instance, Miss Jackson received the full amount of the check, either in cash or draft that were the same as cash (R. 79-80; Tr. 72, 73, 98, 127-130, 135). None of the checks were taken for collection and when they were cashed, the Elkton bank

became the owner of them. The drafts or cashier's checks with which some were paid were required to be honored by the Elkton bank no matter who might present them. When the checks were sent to Pittsburgh they were sent by the Elkton bank in its own right as owner of the checks to reimburse itself[4] (R. 71-72).

Appellant's motion for directed verdict for insufficiency of the evidence was overruled (Tr. 518-519). Motion in arrest of judgment and for a new trial was filed (Tr. 2). Opinion and order overruling said motion were filed July 24, 1943 (R. 55) and on August 12, 1943, judgment of fine and imprisonment was entered accordingly (R. 64).

Dealing with the contention that the evidence failed to show that the mailing of the checks was "for the purpose of executing" the fraudulent scheme, the Circuit Court of Appeals said (R. 124):

> "He [Decker] insists that when each check was cashed by the Elkton Bank and the proceeds were received, the fraudulent scheme had been entirely completed and, consequently, any subsequent mailing of the checks was not in furtherance of the fraudulent scheme.[5]

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[4] The average balance of Triumph Explosives, Inc., in the Elkton bank was $25,000 so that had any of the five checks failed to clear in Pittsburgh, the Elkton bank would have had the right to charge the checks back against the company and the money would have been there against which to collect it (R. 72).

[5] This statement by the court of petitioner's position is correct only if there be interpolated the words, "so far as it was to be executed by means of that particular check", so as to make the statement read:

> "He [Decker] insists that when each check was cashed by the Elkton bank and the proceeds were received, the fraudulent scheme, so far as it was to be executed by means of that particular check, had been entirely completed and, consequently, any subsequent mailing of the checks was not in furtherance of the fraudulent scheme."

A similar attempt to misstate our position in the court below was met with the following statement in our reply brief:

> "On the contrary appellant has clearly assumed throughout that, because of the series of check cashings, the evidence was adequate to

"To this, we think there are at least two sufficient answers.

"[1] Here the fraudulent scheme was clearly a continuing one. There is every reason to infer that the scheme would have continued more or less indefinitely until the detection of the fraud, which seems to have been effected largely through the investigations of Lieutenant Commander Seidman of the Price Adjustment Board of the Navy Department. This issue was also left to the jury by Judge Chesnut in the portion of his charge quoted above in this opinion.

"[2] Even if the scheme be limited to one isolated transaction, the cashing of a single check, we still think this contention lacks merit. The indictment charged a scheme to defraud Triumph, and Triumph was not defrauded, i. e., suffered no economic detriment, until the check had been received through the mail by the Pittsburgh bank and had been charged against Triumph's account in that bank. Thus, the complete and final success of the fraudulent scheme required the use of the mails for its ultimate successful consummation. *Tincher* v. *United States*, 11 F. 2d 18 [C. C. A. 4]; *Hart* v. *United States*, 112 F. 2d 128 [C. C. A. 5], cert. denied 311 U. S. 684; *United States* v. *Leche*, 34 F. Supp. 982, 118 F. 2d 246 [C. C. A. 5], cert. denied 314 U. S. 617; *Steiner* v. *United States*, 134 F. 2d 931 [C. C. A. 5]."

Accordingly, the judgment of the district court was affirmed (R. 125).

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support a finding that the scheme was single and a continuing one. It is our position that despite the continuing existence of the scheme to defraud, the mailing of the checks by the Elkton bank could not have been in furtherance of the continuing scheme because each mailing occurred only after the appellant had obtained the money for the particular check and after the corporation had been irretrievably subjected to liability for the amount of the check. * * * So far as the execution of the scheme is concerned the checks are thereafter obviously *functus officio*.

Specifications of Error to Be Urged.

The circuit court of appeals erred:

1. In holding that as to each individual check, the use of the mails by the Elkton bank was in furtherance of the scheme to defraud.

2. In failing to hold that there is no use of the mails for the purpose of executing the scheme to defraud where the mailing is of a check for collection (a) by a bank that has become holder in due course of the check (b) after the defendant has obtained cash for the check in consummation of the scheme as to that check (c) after the victim's loss on the check has become unavoidable.

3. In holding that where there is in existence a continuing scheme, any mailing of a check caused by defendant—even though the fraud as to that check already has been executed—is a mailing "for the purpose of executing such scheme" within the meaning of the statute.

4. In failing to hold that evidence merely that defendant has caused the use of the mails during the continuance of a scheme to defraud, in the absence of a showing that such use was intended, or did in fact tend to, attain the object of the fraud or conceal it, is insufficient as a matter of law to establish that such use was "for the purpose of executing such scheme" within the meaning of the statute.

Reasons for Granting the Writ.

The gist of the statutory offense with which petitioner is charged is the use, or the causing of the use, of the mails "for the purpose of executing such [fraudulent] scheme." *United States* v. *Young*, 232 U. S. 155, 161; *Hass* v. *United States*, 93 F. 2d 427, 429 (C. C. A. 8, 1938); *Stryker* v. *United States*, 95 F. 2d 601, 604 (C. C. A. 10, 1938); *Gates* v. *United*

States, 122 F. 2d 571, 577 (C. C. A. 10, 1941) cert. denied 314 U. S. 698.

Under the statute, there were four elements to be established: (1) The fraudulent scheme; (2) Use of the mails; (3) That petitioner caused such use; (4) That such use was "for the purpose of executing such scheme."

Petitioner concedes (1) that the evidence was adequate to support a finding of the existence of the fraudulent scheme and that it was a continuing one, and here waives the contention made in the court below and concedes (2) that the circumstantial evidence was sufficient to sustain a finding that the mails had been used by the Elkton bank in forwarding the checks to Pittsburgh. Petitioner throughout has also conceded (3) that the evidence is adequate as to causation, i.e., that, if such use was as a matter of law "for the purpose of executing said scheme," then the use of the mails by the Elkton bank in forwarding the checks to the Pittsburgh bank was a possibility so apparent as to justify a finding that petitioner did "cause to be placed" in the mails the checks in question.

The sole question is as to the fourth element, the gist of the crime: Whether the evidence is sufficient as a matter of law to establish that the use of the mails was "for the purpose of executing such scheme."

Our contention is that the evidence fails to show use of the mails "for the purpose of executing such scheme":

a. Because, as to each check, the mailing was after the cash had been paid to defendant and after the victim corporation had become legally obligated to reimburse the Elkton bank as holder in due course, each mailing by the Elkton bank was after the fraud as to that check was complete and so was not, within the meaning of the statute, "for the purpose of executing such scheme." So far as the scheme was to be executed or accomplished by means

of each particular check, the scheme was consummated when the cash was paid to the petitioner and the victim lost power to prevent the loss.

b. Because evidence merely showing a continuing fraudulent scheme, and a contemporaneous use of the mails by the defendant, without more, is clearly insufficient as a matter of law. There still remained to be satisfied the statutory requirement that the use of the mails be shown to be "for the purpose of executing such scheme". Plainly, the mailings were not to aid the obtaining of moneys on the subsequent checks. Furthermore, the record fails to show, and the court below failed to cite, any evidence that the mailing in any way furthered the continuing fraud by concealing it.

1. **A clear conflict of circuits is presented.**—To support the holding that the mailing by the Elkton bank was in furtherance of, or for the purpose of executing, the scheme, the decision of the circuit court of appeals was based on two separate grounds (R. 124): (1) that the scheme was a continuing one; (2) that as to each check, the scheme to defraud was not consummated, i. e., the Triumph Company was not defrauded, i. e., suffered no economic detriment, until the check had been received through the mail by the Pittsburgh bank and had been charged against Triumph's account in that bank."

This second ground of decision is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Stapp* v. *United States*, 120 F. 2d 898, 899 (1941).[6] There the victim purchased a cashier's check of

[6] It is hornbook law, of course, that where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court, of equal validity with the other, and to be regarded as authority, equally with the other. *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143; *Union Pacific Co.* v. *Mason City Co.*, 199 U. S. 160, 167; *United States* v. *Title Ins. Co.*, 265 U. S. 472, 486; *Richmond Co.* v. *United States*, 275 U. S. 331, 340.

the Paul's Valley bank with a check on his account in a Tyler, Texas, bank. He delivered the cashier's check to the defendant who the next day cashed it in pursuance of the fraudulent scheme. The victim's check was sent for collection through a Fort Worth bank and the use of the mails relied upon was the mailing of the check for collection to the Tyler bank by the Fort Worth bank. The Fifth Circuit held that when the Paul's Valley bank accepted the victim's check and the money was paid to the defendant, the victim was then and there defrauded. It reasoned:

> "Christian [the victim] could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatever in that transaction. None of the banks involved, was their agent, innocent or otherwise. The mailing of the letter from Fort Worth to Tyler was not in furtherance of the scheme and was not 'caused' by them."

The Fifth Circuit thus recognized the rule that where as here, defendant has obtained the cash which is the object of the fraud and the victim is without a legal defense to collection by the bank which holds the check and so cannot successfully intervene to stop payment to avoid the loss, the subsequent mailing of the check for collection is not, within the meaning of the statute, "for the purpose of executing the scheme."

The decision in the instant case is also in conflict with the decision in *United States* v. *McKay*, 45 F. Supp. 1001 (E. D. Mich. 1942) where the court said (p. 1006):

> "In both the *Stapp* case and the present case, it was beyond the power of the victim to intervene and stop payment on the check which was the subject of the mailing * * * because after it was cashed by the bank the bank became a holder in due course whose

rights against the drawer of the check could not be thus defeated."

The opinion of Judge Parker in *Tincher* v. *United States*, 11 F. 2d 18, 21 (C. C. A. 4, 1926) as to one of the three mailings involved in that case, is, and is cited as, precedent for the decision in the instant case (R. 124). But Mr. Justice Douglas, in his dissent in *Adams* v. *United States ex rel McCann*, 317 U. S. 269, 283, fn. 7, apparently recognized the conflict between the same circuits resulting from the *Tincher* case and the decision in *Stapp* v. *United States*, 120 F. 2d 898 (C. C. A. 5).

There is also a conflict in principle with the decision in *Dyhre* v. *Hudspeth*, 106 F. 2d 286, 288 (C. C. A. 10).

2. **The decision conflicts in principle with the opinions of the Circuit Court of Appeals for the Fifth Circuit upon which it relies.**—The court below, as did the district court (R. 62-64), refused to give effect to the fact that under the negotiable instruments law the Elkton bank upon cashing the checks became a holder in due course, *Dean* v. *Eastern Shore Trust Co.*, 159 Md. 219; *Standard Trust Co.* v. *Commercial Nat. Bank*, 240 Fed. 303; 1 Md. Ann. Code (1939), Art. 13, Sec. 76, and at the same instant the victim corporation lost power to intervene to stop payment and so avoid the loss (R. 125). On the other hand, both courts below relied heavily (R. 62, 124) upon the decisions in *Hart* v. *United States*, 112 F. 2d 128 (C. C. A. 5, 1940) cert. denied 311 U. S. 684, and *United States* v. *Leche*, 34 F. Supp. 982, aff'd 118 F. 2d 246 (C. C. A. 5, 1941) cert. denied 314 U. S. 617.

Yet mere cursory examination of the opinion in the *Hart* case makes it plain that it applies the same rule as in the *Stapp* case, and that the result there turned on the distinguishing fact that at the time of the mailing the defendant had not yet obtained payment in full from the cashing bank,

the bank had not yet become a holder in due course and the loss was not yet beyond the power of the victim to prevent. The defendant had received in cash only $25,000 of a $75,000 check and had been given a $50,000 deposit credit for the balance. The court therefore held (112 F. 2d 128, 131):

> The scheme to defraud was not at an end when Hart indorsed and presented the check to the bank for no one had yet been defrauded. Louisiana State University and Agricultural and Mechanical College, the State and its taxpayers sustained no actual loss until the check had been finally paid, and it is clear that before the Louisiana State University account was charged with this item the University might have intervened to stop payment and the fraudulent scheme would have been frustrated.

By weight of authority, the bank upon the mere crediting to the account of the depositor did not become a holder for value. *Thompson* v. *Sioux Falls Nat. Bank*, 150 U. S. 231; *Bridgetown Nat. Bank* v. *Way*, 253 Fed. 731, 733 (C. C. A. 4); *Southern Trust Co.* v. *Vaughn*, 277 Fed. 145; Brannan, Negotiable Instruments Law (6th ed.) sec. 25, pp. 375-376). Only to the extent that it advanced cash or withdrawals were made did it become pro tanto a holder in due course. *Southern Trust Co.* v. *Vaughn*, *supra*, 149; *Second National Bank* v. *Breitung*, 203 App. Div. 636, 197 N. Y. S. 375 (1922); *Freeport Bank* v. *Viemeister*, 227 App. Div. 457, 238 N. Y. S. 169; *Ashley & Rumelin* v. *Brady*, 41 Idaho 160, 238 Pac. 314; *Haschenberger* v. *Dennis*, 118 Neb. 411, 225 N. W. 25; *Hodge* v. *Smith*, 130 Wis. 326; *Cedar Rapids Nat. Bank* v. *Snoozy*, 55 S. Dak. 655, 215 N. W. 96; Bigelow, Bills, Notes and Checks (3rd ed.) sec. 477, p. 368 and cases cited; 2 Daniels, Negotiable Instruments (7th ed.), sec. 899, p. 954. Sections 27 and 54 of the Negotiable Instruments Law as carried into the Louisiana statutes, 1 La. Gen. Stats. 1939 (Dart) Secs. 816, 843.

Under these well established principles it was plain that at least with respect to the $50,000 deposit credit the Whitney bank was a mere holder, not for value, and therefore took title subject to all the defenses, both real and personal.

Hence, as the Fifth Circuit held, until the check had been finally paid by the drawee bank, the University had not been defrauded since its potential liability to loss was still subject to avoidance by intervention to stop payment.[7]

That the *Hart* case applies the same rule as the *Stapp* case and goes off merely on the facts was explicitly recognized by Judge Hutcheson who sat in both cases. *Steiner* v. *United States*, 134 F. 2d 931, 936.

Dealing with the two cases in *United States* v. *McKay*, 45 F. Supp. 1001, the court said (p. 1006):

> "But the apparent conflict [with the *Stapp* case] does not really exist when the opinion in the *Hart* case is carefully considered. It expressly recognized the rule that a use of the mail after the fraud was complete fails to bring the case within the statute, but held that the scheme to defraud in that case 'was not at an end

[7] There is some ground for the view that the Louisiana courts would have held the Whitney bank a holder in due course as to the full amount of the $75,000 check on the theory that the mere setting up of a deposit credit is payment for the check, rather than a promise to pay. See *In re Liquidation of Canal Bank & Trust Co.*, 181 La. 855, 877, 880, 160 So. 609. It appears that the Fifth Circuit decided the *Hart* case under the general law in the federal courts and under the majority rule under the negotiable instruments law, and perhaps ignored this Louisiana decision.

Explanation for the broad language of the *Hart* case, which apparently does not recognize the Whitney bank as even a *pro tanto* holder in due course, may be found in the fact that McCord, J. who wrote the opinion in the *Hart* case sat for many years as an Alabama state court judge. Under the Alabama decisions, the cashing bank would not become a holder in due course for any amount until the entire deposit credit was withdrawn. *Tatum* v. *Commercial Bank & T. Co.*, 185 Ala. 249, 64 So. 561; *Colorado Nat. Bank* v. *Western Grain Co.*, 218 Ala. 339, 118 So. 588; *Citizens Nat. Bank* v. *Buckheit*, 14 Ala. App. 511, 71 So. 82, cert. denied, 196 Ala. 700.

> when Hart indorsed and presented the check to the bank for no one had yet been defrauded." Its ruling was expressly based upon its interpretation of the law as applied to the facts before it, which, whether it was correct or incorrect, was that the drawer of the check "might have intervened to stop payment and the fraudulent scheme would have been frustrated.' "

It is thus apparent that, so far from supporting the decision of the circuit court of appeals in the instant case, the *Hart* case recognizes the rule which requires reversal on the facts of record in this case.

United States v. *Leche*, 34 F. Supp. 982, aff'd 118 F. 2d 246 (C. C. A. 5, 1941) is even more obviously distinguishable on its facts. There the mailing relied upon was the mailing to the defendant's bank for deposit of checks drawn by the victim and endorsed by the defendant. At that stage, liability had not been imposed beyond prevention by the victim nor had the accused secured the moneys which were the object of the fradulent scheme.

Plainly, the decision of the court below finds no support in the Fifth Circuit cases upon which it relies. On the contrary, the rule there applied requires reversal in the instant case.

3. **The alternative ground of decision is clearly without merit.**—The court below stated as its first ground of decision (R. 124):

> "Here the fraudulent scheme was clearly a continuing one. There is every reason to infer that the scheme would have continued more or less indefinitely until the detection of the fraud * * *. This issue was also left to the jury by Judge Chestnut * * *"

Despite the fact the scheme was admittedly a continuing one, the Government still had the burden of showing that the mailings were "for the purpose of executing" it. To

sustain this burden the court below cited no evidence and there was none. Therefore, even if it were pertinent to the question of conflict of circuits presented on petition for certiorari—and as shown above, being only one of two alternative grounds, it is not—this first alternative ground of decision advanced by the court below fails to meet the issue and is inadequate to support the judgment.

Conclusion.

The Circuit Court of Appeals for the Fourth Circuit rendered a decision in clear conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit. The jurisdiction of this Court is invoked to resolve the conflict.

Wherefore, it is respectiully submitted that this petition for a writ of certiorari should be granted.

February, 1944.

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